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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 396

ADDISON RAYMOND KETCHUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a; R. 67-74) is not yet reported. The opinion of the district court (R. 27-35) is reported at 212 F. Supp. 53.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1963 (R. 75). On July 23, 1963, Mr. Justice Harlan extended the time for filing a petition

for a writ of certiorari to and including August 24, 1963. The petition was filed on August 22, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction of an appeal from the dismissal of counts of an indictment, where the district court's order was based on both a construction of the indictment and a construction of the statute.

2. Whether the court of appeal properly held that the district court's dismissal of counts of an indictment was not an appropriate remedy for assigned duplicity.

STATUTES INVOLVED

18 U.S.C. 3731 provides in part:

An appeal may be taken by and on behalf of the United States from the district courts directly to the Supreme Court of the United States in criminal cases in the following instances:

From a decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy and the time for appeal or writ of error has not expired, except that no appeal shall lie where the double jeopardy provision of the Constitution would prevent affirmance of a judgment on behalf of the defendant in the case;

An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases in the following instances:

while an employee of the International Cooperation Administration, an agency of the United States Department of State, he unlawfully received compensation for services rendered in connection with a foreign aid project financed by the United States in the Republic of the Philippines. Each of the eight counts specified a separate payment on a separate date between July 1957 and April 1958 (R. 5-6). Count 9, setting out the details of the scheme to defraud, charged petitioner and one Thompson with conspiracy to violate 18 U.S.C. 281 (R. 6-11). Petitioner filed a motion to dismiss Counts 2 through 8 of the indictment on the ground that they were merely duplicitous of Count 1 (R. 12-13). After a hearing on this motion (R. 14-26), the district court ordered Counts 2 through 8 dismissed as "duplicative of the first count" (R. 27-35). The government appealed to the court of appeals from this ruling by the district court (R. 36-37).

Petitioner thereafter filed in the court of appeals a motion to dismiss the government's appeal on the ground that the Supreme Court had exclusive jurisdiction of the appeal (R. 38-42). The court of appeals ruled that it had jurisdiction of the appeal since the district court's dismissal of the indictment, while ultimately involving a construction of the statute as not making a separate crime out of each receipt of money pursuant to a single course of conduct, "must also have rested on a construction of the indictment as charging only a single corrupt course of conduct by Ketchum and passivity in his receipts—a construction which the Government contends not to be a

necessary one." The court also ruled that dismissal of counts 2-8 was improper because (1) it was not a necessary reading of the indictment (no evidence having been developed that the receipts were merely a bribe paid in installments and (2), in any event, dismissal of the counts was not an appropriate remedy for duplicity (Pet. App. 1a-8a).

ARGUMENT

I. The court below correctly ruled that it had jurisdiction over the government's appeal from the district court's dismissal of Counts 2 through 8 of the indictment. Under the Criminal Appeals Act, 18 U.S.C. 3731 (*supra*, pp. 2-3), the court of appeals has jurisdiction of an appeal except where an appeal lies to this Court. This Court has always strictly construed the Criminal Appeals Act and narrowly limited its jurisdiction to the instances specified. *United States* v. *Wexler*, 361 U.S. 431, 437; *United States* v. *Jones*, 345 U.S. 377, 378. Where the district court order dismissing the indictment rests solely upon construction of the statute underlying the indictment, this Court has exclusive jurisdiction of the appeal. But where (as here) the order of dismissal depends initially upon the interpretation of the indictment, jurisdiction of the appeal must lie in the court of appeals rather than in this Court. *See United States* v. *Jones*, 345 U.S. 377.

In this case, the district court's interpretation of Section 281 was clearly based on its initial reading of the indictment as charging that each receipt of money was "in furtherance of one single plan to do

fraud" (R. 29). It found that the "indictment in its present form charges only one course of conduct"; that the "first 8 counts all relate to this one scheme"; that the petitioner "was a passive recipient of the funds which were credited to him" (R. 30); that petitioner "is not charged with a new and wrongful course of conduct each time he received money"; that the "payments to him were all for a single act"; and that it "was a bribe paid in installments and not a series of separate bribes" (R. 34). The government challenged this reading of the indictment. Thus, it properly took its appeal to the court of appeals.[1]

2. The court below properly held that the dismissal of counts 2 through 8 of the indictment by the district court was not an appropriate remedy. As already noted the district court's decision is based upon its factual conclusion that the individual payments alleged in Counts 1 through 8 were essentially passive acts requiring "no new decision or impulse" and part of a single scheme (R. 32-33). But that conclusion is not compelled by the bare allegations of the indictment in the statutory language (R. 5-6); it will be justified only if the trial evidence substantiates it. This Court's observations in an analogous situation

[1] Unlike the situation here, in *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, the district court's dismissal of counts in the indictment was predicated solely upon the construction of a statute. And in *United States* v. *Sampson*, 298 F. 2d 826 (C.A. 5), motion to remand denied, 369 U.S. 836, reversed, 371 U.S. 75, the district court's dismissal order was based upon construction of the term "execution" in the mail fraud statute.

in *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 225-226, are appropriate here:

> Whether an aggregate of acts constitute a single course of conduct and therefore a single offense, or more than one, may not be capable of ascertainment merely from the bare allegations of an information and may have to await the trial on the facts.
>
> This information is based on what we find to be an improper theory. But a draftsman of an indictment may charge crime in a variety of forms to avoid fatal variance of the evidence. He may cast the indictment in several counts whether the body of facts upon which the indictment is based gives rise to only one criminal offense or to more than one. To be sure, the defendant may call upon the prosecutor to elect or by asking for a bill of particulars, to render the various counts more specific. In any event, by an indictment of multiple counts the prosecutor gives the necessary notice and does not do the less so because, at the conclusion of the Government's case the defendant may insist that all the counts are merely variants of a single offense.
>
> By affirming this order without prejudice to amendment of the information, we do not mean to suggest that amendment to increase the number of offenses may be made after trial has begun. But the Government is not precluded from now amending the information either to meet the exigencies of the evidence or to charge as separate offenses separate courses of conduct as to each substantive provision.

See also *United States* v. *Frichauf*, 365 U.S. 146; *United States* v. *Maryland State Licensed Bev. Ass'n.*, 240 F. 2d 420, 421 (C.A. 4).

After the government's evidence has been introduced at the trial, it may be that petitioner's theory that there was only a single course of conduct and a single offense will prevail. On the other hand, the evidence adduced may warrant a reasonable finding of separate fresh impulses in relation to the receipt of each payment,[1] in which event separate offenses may be involved. Cf. *United States* v. *Tolub*, 309 F. 2d 286, 289 (C.A. 2); *United States* v. *Alaimo*, 297 F. 2d 604, 606-607 (C.A. 3), certiorari denied, 369 U.S. 817; *Patton* v. *United States*, 42 F. 2d 68, 69 (C.A. 8). In any event, determination of whether a single offense or multiple offenses are here involved can be made only after introduction of the prosecution's evidence at the trial. Petitioner's claim, therefore, that Counts 2 through 8 of the indictment should be dismissed at this stage of the proceedings is premature.

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[1] For example, the evidence may show that payments were made by different persons, under different circumstances, and in relation to different phases of the contracts with the Republic of the Philippines.

Similarly, it is premature to indulge in speculation as to the possibility that petitioner may ultimately receive consecutive sentences on all eight substantive counts for the maximum allowable penalties (see Pet. 20). That question can be met when and if it arises.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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